Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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REVIEW OF THE COMMISSION'S REGULATIONS GOVERNING TELEVISION BROADCASTING	)	MM DOCKET NO. 91-221
	)	
TELEVISION SATELLITE STATIONS REVIEW OF POLICY AND RULES	)	MM DOCKET NO. 87-81
	)	

Comments of the Association of Local Television Stations

TO THE
SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

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Executive Summary

The time has come to provide meaningful relief from the FCC's antiquated duopoly rule. The rule was enacted to address problems confronting the FCC during the early 1960s. Over three decades later, the policy concerns that underpin the rule have changed. Gone are the days when a few over-the-air television stations were the only media voices in the local market. Today's marketplace is characterized by numerous broadcast and non-broadcast media voices. Competition is fierce. Consumers have limitless viewing and listening options. Advertisers have countless mechanisms for getting their message across to potential customers.

Against this backdrop is a thirty year old rule which assumes that diversity and economic competition can only be preserved by limiting broadcasters to one television station per market. Precisely the opposite is true. Broadcasters simply cannot survive in a multi-channel world if they are limited to one over-the-air channel. It is ironic that other subscription based over-the-air systems (MMDS & DBS) can control multiple channels in each locality while the only free service is limited to one channel per market.

ALTV believes the time has come to permit commonly owned UHF/UHF or UHF/VHF stations in local markets. Local market combinations involving UHF facilities provide no threat to either diversity or competition. UHF stations are unique and do not generally occupy dominant positions in local media markets. To the contrary, these combinations will improve the quality of the free, over-the-air television service. Program and viewpoint diversity will be enhanced and advertisers will have more competitive voices.

To the extent the FCC decides to keep the duopoly rule, UHF/UHF and UHF/VHF combinations should be permitted as an exception to the rule. There is no need to adopt a costly waiver process that will only drain precious station resources.

When Congress enacted the 1996 Telecommunications Act, it specifically grandfathered existing local marketing agreements. It did so because of the significant public interest benefits LMAs provide in local markets. The record is replete with evidence demonstrating that these arrangements increase service to the public. A sound LMA policy will become more important if the FCC fails to provide the meaningful duopoly relief mentioned above.

ALTV opposes the FCC's proposal to grandfather existing LMAs only for the term of existing contracts. Moreover, we disagree with the FCC that these contracts should terminate when a station is sold or transferred. Make no mistake, these proposals are the antithesis of grandfathering and jeopardize existing LMA agreements. In addition, Congress specifically called for a policy that would permit future LMAs as well. The FCC should enact LMA policies that facilitate the creation of new arrangements on terms and conditions similar to those that receive grandfathered status.

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I. Introduction

The Association of Local Television Stations (ALTV) hereby files the following comments in the above captioned proceeding. In one form or another, the FCC has had a proceeding dealing with local television ownership rules for over five years. The time has come to recognize the competitive realities of the marketplace and give local television stations the opportunity to compete in a multichannel world. Once again, ALTV urges the FCC to modify its rules in the following manner:

Duopoly Rule: **Television station owners should be permitted to acquire up to two television stations in a local market, provided one of the facilities is a UHF station.**

LMAs: **Congress stated that these arrangements benefit the public interest. Existing combinations should be truly grandfathered. The FCC's proposal to limit these combinations to the term of current agreements is contrary to congressional intent. These arrangements should be freely renewable and transferrable. FCC rules should not limit the formation of new LMA agreements.**

ALTV believes the appropriate regulatory response to the record is to permit, by FCC rule, UHF/UHF and UHF/VHF combinations in local markets. We do not believe that a lengthy hearing or waiver process benefits viewers, stations or the American public. In a highly competitive media environment, telecommunications investors have numerous choices. A case by case approach to local ownership injects a significant amount of uncertainty into the process and capital will flow to more stable non-broadcast investment opportunities. Accordingly, a station's ability to own either a UHF/UHF or a UHF/VHF combination in the same local market should be recognized as a matter of FCC rule.

The overwhelming majority of comments filed previously in this proceeding supported relaxation of the duopoly rule.[1] While the Commission now requests additional

[1]*See e.g.*, Comments of the Freedom of Expression Foundation at 14, Comments of Media America Corporation at 8, Comments of Golden Orange Broadcasting Co. at 2, Comments of Louisiana Television Broadcasting Corp., Comments of Ellis Communications Inc. at 6., Comments of Tribune Broadcasting Company at 31, Comments of National Broadcasting, Company, Inc. at 4., Comments of Malrite Communications Group, Inc. at 34-35, Comments of the Local Station of the Local Station Ownership Coalition at 3-4, Comments of the Communications Corporation of America at 2, Comments of the Dispatch

evidence on specific issues, it should not lose sight of the fact that a majority of the comments in the prior proceeding supported significantly more relaxation of the television duopoly rule than the proposals contained in the *Second Further Notice of Proposed Rule Making.*[2]

Finally, the Commission must recognize that the 1996 Telecommunications Act moved in a *deregulatory* direction with respect to the local television duopoly rule.[3] While the Act did not eliminate the rule, the bill that passed the House of Representatives relaxed the rule significantly. Moreover, the Conference Report expressly acknowledged that local combinations and LMAs benefit the public. Congress has provided the FCC with a template for re-examining the duopoly rule and LMA policies. It should not revisit the rule using glasses designed in the 1960s or 1970s. Congress envisioned an analysis that takes into consideration the plethora of video voices that compete with local television stations. As Senator Ford observed during the debates:

> Mr. President, in addition to reforms of the local and long distance telephone companies, this conference report includes a number of overdue revisions to the laws regulating broadcasters. I believe that these changes are necessary to respond to the changing competitive nature of the broadcast industry, in the same manner as the changes this conference report foresees for the telephone industry.

Broadcast Group at 2. Strategic Policy Research at 17 appended to Comments of Fox Television Stations Inc., Comments of Westinghouse Broadcasting Company at 28.

[2]*Second Further Notice of Proposed Rule Making* in MM Docket No. 91-221, FCC96-438 (*released* November 7, 1996) (hereinafter cited as *Second Further Notice*).

[3]Pub. L. No. 104-104,110 Stat. 56 (1996)

> The duopoly rule was last revised by the FCC in 1964. And it prevents the ownership of more than one television station in a local market. This regulation served a useful purpose by ensuring there would be competition and a diversity of media voices in a television market.
>
> However, in the last 32 years, the local media have gained so many new competitors that I have begun to question whether the duopoly rule still promotes good policy. That is why I endorse the provisions of the conference report which direct the FCC to conduct a rule-making to determine whether to retain, modify, or eliminate this rule.[4]

Viewed from this perspective, and given the almost universal recognition that changes in the television marketplace compel modification of the duopoly rule, the burden is on those opposing relaxation of the duopoly rule to provide evidence of harm to the public. To date, there is no hard evidence, empirical or otherwise, demonstrating that LMAs harm the public. ALTV urges the FCC to act promptly.

II. Local Market Competition Is Intense.

A. Over-the-air television competition has exploded

As documented by numerous parties to this proceeding, competition for advertising and viewers in local television markets has increased dramatically since the duopoly rule was first enacted. From 1964 to 1996, the number of commercial television stations has increased 100% from 582 to 1,165. Non-commercial stations increased by 361%, from 79 to 364. There are now 1,616 low power stations which did not exist in 1964.[5] Today the

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[4] 142 CONG. REC. S 687, S 705 (daily February 1, 1996)

[5] Comments Local Station Ownership Coalition at 5.

average number of stations in the top ten markets is 13.4, markets 21-30 average 9.8 stations and even in small markets (101-110) there are an average of 5.3 stations.[6]

B. Multi-channel competition is fierce

The dramatic increase in the number of local television stations does not tell the entire story. Multichannel competition has created fierce competition at the local level. As we documented in previous comments, cable has become the predominant competitor in local television markets. The rise of clustered multiple systems operators (MSOs) and local cable interconnects have made cable a formidable competitor in local markets.[7] From 1993 to 1998, local cable advertising revenue is projected to grow at a compound annual rate of 14.2% compared to a 6.4% growth rate for local broadcast advertising.[8] The competitive impact of cable television in local markets is well documented in this proceeding and no contrary evidence has been presented. To be perfectly blunt, there is not an economist alive that does not recognize cable as a multi-channel competitor to local television stations for viewers and advertising dollars. Even *U.S. News and World Report* acknowledged this fact as it applies to children's programming.

> For the first time a cable network is not only cutting into network viewing but threatening to chase them right out of business, says Tom Wolzien, financial analyst with Sanford C. Berstein & Co....

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[6]Comments of New World Communications Group Inc. at 23.

[7]*See* INTV Comments at 11-13.

[8]*Id.* at 12-13.

> Traditional broadcast networks, analysts say, simply can't compete with cable stations that are there for kids all the time and can promote their shows endlessly.[9]

Competition from cable television is no longer an academic discussion confined to neat statistical studies measuring cross-elasticity of demand. From a diversity perspective, the views expressed on the hundreds of cable channels being telecast contribute to the debate in local markets. From a competition standpoint, the alternative outlets for local advertisers are endless.

Cable is not the only multichannel competitor. The telephone companies are entering the market and have already commenced advertising operations. While some Bell Operating Companies have withdrawn current video plans, others have decided to enter the business as traditional cable systems.

With the infusion of hundreds of millions of dollars, multi-point multi-distribution service (MMDS) will rapidly become a major player in local markets. The comparisons between local television stations and MMDS are rather startling. MMDS operators have been granted not one, but 30 over-the-air channels. With digital compression, MMDS operators could control more than 120 over-the-air channels. Unlike local television stations, MMDS operators are not subject to children's programming requirements or other

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[9] "When rivals get animated: The networks and cable fight over kids TV. Round 1 to

public interest obligations. Local over-the-air television stations provide free service to the American public. Consumers must pay to receive MMDS. Simply put, the FCC will permit one group to own multiple over-the-air channels in the same local market to provide a subscription service while at the same time limiting the free over-the-air service to one channel. Frankly, this policy makes no sense.

The same can be said for DBS services, which provide multiple channels of over-the-air video programming into every local market in the country. The FCC is perfectly willing to allow a handful of entities to control hundreds of subscription based, over-the-air channels in each local market, while at the same time limiting free, local over-the-air television broadcasters to one channel. This will become a major issue this year. Direct satellite systems are already planning to uplink local television stations and beam these signals back into the station's local market. Technological developments in satellite spot beam technology may soon give DBS systems control over hundreds of local channels in each local market. Given this technology, a DBS service could commence a competitive local television service over multiple channels in each local market and bypass existing local terrestrial stations. These new "local" stations could be packaged with hundreds of nationally delivered channels. It simply makes no regulatory sense to limit *terrestrial*, over-the-air television stations to one video channel per market, while giving competitive *satellite* DBS systems multiple channels.

In addition, non-electronic media such as local newspapers, provide significant competition for advertising in local television markets. The Comments of Malrite accurately document the competitive relationship between local television stations and local newspapers in the Cleveland market, and other commenters provide an equally compelling analysis of the substitutability between these media options.[10] The Yellow Pages, regionally distributed magazines and billboards also compete for advertising revenue at the local level with television stations.

Finally, several parties accurately observed that VCRs also compete for viewers in local markets. Consumers use VCRs for much more than taping television programs. Blockbuster has built a multi-billion dollar business based on video tape rentals. Simply put, while you are watching rented video tapes, you are not watching local broadcast television. The FCC must stand up and recognize the competitive relationship between this vast array of media alternatives. There is no evidence in the record to contradict these fundamental economic facts, and thus the time has come to relax the duopoly rule.

C. The product market for diversity and competition should not be limited to off-air television stations

Despite this overwhelming record, the *Second Further Notice* continues to assume that free, over-the-air television is a distinct market. On this point, the FCC merely states:

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[10]National Economic Research Associates, Inc. (NERA): An Economic Analysis of Advertising Markets at 2, appended to Comments of Malrite Communications Group.

> We noted the lack of unanimity among the parties as to which products and services are substitutes and which are not. Given the many changes that are taking place in the television industry and the lack of consensus in the record, we ask her for comment on whether we should, until we observe further marketplace developments focus only on broadcast television outlets in counting voices for this proposed waiver.[11]

While this discussion arises in the context of the appropriate voice test under the proposed waiver standard, it permeates the FCC's entire approach to local television ownership rules. Indeed, the Commission's failure to recognize market realities as well as its own precedent leads it to an approach that does not adequately address the competitive issues confronting local television stations. It also takes the FCC down a path of creating a needless waiver process, and diverting scarce revenues from station operations and into the hands of Washington lawyers. ALTV believes the FCC should remember the following facts.

A review of FCC proceedings reveals that *unanimity* among the comments is not a prerequisite for determining the product and geographic market for the FCC's ownership rules. If "consensus" among the comments is the determining element in this proceeding then, ALTV suggests the FCC simply add up the number of comments proposing a relaxation of the duopoly rule. It will find an overwhelming consensus to permit UHF/UHF and UHF/VHF combinations in the same local market.

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[11] *Second Further Notice* at 25 para 52.

As far as determining which media voices should be included in an overall assessment of the duopoly rule, ALTV suggests the FCC review its own decisions. For nearly two decades, the Commission has recognized the competitive relationship between local television stations, cable and other non-broadcast media. For example, in 1983 the FCC concluded:

> The record in this proceeding supports the conclusion that the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media , and numerous print media as well.[12]

This analysis is the cornerstone for hundreds of the Commission's policy decisions. For example, the regional concentration rules, national multiple ownership rules, deregulation of program content requirements, elimination of the fairness doctrine, relaxation of the radio ownership rules, elimination of the financial interest and syndication rules and elimination of the prime time access rule were all predicated on the concept that local television stations compete with cable and other non-broadcast media. As the Commission observed throughout the *Prime Time Access Rule* decision:

> ...[A] good case can be made that, from the viewers perspectives, cable system operators, inter alia, are economically relevant alternative distributors of video programming.[13]

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[12] *Amendment to National Multiple Ownership Rules*, Gen Docket No. 83-1009, 100 FCC 2d 17, 25 (1983):

[13] *Repeal of the Prime Time Access Rule*, 78 RR2d, 1077, 1082 at para. 26 (1995)

> This is a strong conclusion because the inclusion of additional television alternatives such as cable, satellite systems, video dialtone, etc. would serve to make domination by the networks and affiliates even less likely.[14]
>
> Indeed one of the likely effects of growth in cable systems is to reduce viewer's valuations of over-the-air broadcast programming overall.[15]
>
> There has been dramatic growth in the number of independent stations, and broadcasters now must compete for audiences with the increasing number of non-broadcast outlets especially cable services.[16]

Even in the instant proceeding the Commission admits, *albeit* begrudgingly, that viewers have a wide variety of video choices.

> Accordingly, television viewers have more choices among video programming delivery services than at the time of this rules adoption.[17]

In every instance, the FCC relied on the competition between broadcast and non-broadcast video sources to reach a decision. In all these cases, the Commission expressly recognized that these alternative non-broadcast sources were substitutes with respect to the diversity of voices and economic competition. To now state there is a lack of "consensus" about what services should be considered as a competitor to local broadcast stations simply defies logic, legal precedent and, quite frankly, common sense. In effect, the FCC

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[14]*Id* at para 31.

[15]*Id.* At para 44

[16]*Id.* at para 113.

[17]*Second Further Notice of Proposed Rule Making* in MM Docket No. 91,221 (released November 7, 1996) at note 20.

is questioning the legal basis for hundreds of rule making decisions and countless transfer cases.[18]

There is not a scintilla of evidence in the entire record to suggest that local stations *do not* compete with cable and other non-broadcast voices. The FCC's earlier observations that television has more impact than radio or newspapers is nothing more than metaphysical musing. ALTV remembers a time when conservative radio talk show hosts, like Rush Limbagh, were a primary concern of the Clinton administration. It was not too long ago that Congress was extremely upset with the "tea bag" revolt to congressional pay raises which was lead by AM radio talk show hosts. Does the FCC really believe cable networks such as CNN, MSNBC, CNBC, CNNSI, and C-SPAN do not contribute to debate on issues affecting local communities? Alternatively, numerous local news channels, such as Channel 8 in Washington, certainly provide coverage of issues.[19] Moreover, many

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[18]In the CBS/Westinghouse case, the FCC when granting a temporary duopoly waiver for the Boston/Providence markets recognized that the market for diversity includes non-broadcast voices.:

> Second as to the diversity of voices present in the overlap area during the temporary waiver period, Westinghouse's engineering exhibit indicates that viewers in the overlap area are "well served by a plethora" of other television and *media* outlets. (emphasis supplied)

In re Stockholders of CBS Inc, 11 FCC Rcd 3733, 3763 (1996.)

[19]Albritton's News Channel 8 provides local news feeds for the Washington, Virginia and Maryland metro area. It is ironic that Albritton is permitted to own two video channels in Washington, because one is a cable channel. It would make more sense to permit Albritton to acquire an additional station in Washington, to provide an additional news outlet for all consumers, especially those not subscribing to cable.

"entertainment" cable channels, like the USA Network and MTV have their own news. The same is true for the numerous religious channels now operating on many cable systems.[20]

Finally, diversity concerns should never be confined to "news" and talking head "public affairs programs." Entertainment programs can have an even greater impact on political debate in the community. Focusing solely on "entertainment" vs. "non-entertainment" programs is a meaningless distinction. Indeed, during the Presidential summit on children's programming, most of the time was spent complimenting "The Cosby Show" as the type of program that influences attitudes and fosters learning.

The product market from both a diversity and economic competition perspective should include a variety of broadcast and non-broadcast services. Given the plethora of voices there is every reason to permit the common ownership of UHF/UHF and UHF/VHF stations in the same local market.

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[20]Accordingly, ALTV believes that each cable channel in a station's local market should be considered as a voice for diversity purposes. The Commission's diversity analysis should not be confined to local access or news channels.

D. Diversity will be enhanced by permitting UHF/UHF and UHF/VHF combinations

1. Unless the rule is relaxed, multi-channel competition will lead to fewer stations and less over-the-air diversity

Regardless of what the FCC perceives to be the proper "product and geographic" market for its regulations, the marketplace moves forward. Every day viewers and advertising dollars shift from local television stations to our non-broadcast multichannel competition. While the FCC is fond of characterizing this competition in terms of the "broadcast networks" versus the "cable networks," the crucible of competition is at the local station level.

A world in which all competitive video outlets are multi-channel, restricting free, local over-the-air television stations to one channel is a recipe for economic disaster. The economic pressures placed on free, local off-air television stations from multi-channel providers are enormous. The FCC Office of Plans and Policy (OPP) accurately described the picture back in 1991:

> In the next ten years, broadcasters will face intensified competition as alternative media, financed only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and their audience. Television broadcasting will be a smaller and far less profitable business in the year 2000 than it is now. Although broadcasting will remain an important component of the video mix, small

market stations, weak independents in larger market, and UHF independents in general will find it difficult to compete, and some are likely to go dark.[21]

The impact of multichannel competition is doing precisely what the Commission seeks to avoid. The OPP noted that in large markets, television broadcasters may scale back programming including news and public affairs. Smaller markets will be hit harder with some stations being forced off the air.[22]

The provision of top quality entertainment, non-entertainment news and public affairs programming is directly related to the economic health of a local station. As ALTV observed previously, start up costs of news operations run in the millions of dollars. There is no way stations can provide for such programming if they are operating in the red. By preventing common ownership in local markets, the Commission will keep local off-air television stations in an economic straitjacket and impair their ability to provide the very type of public interest programming that the Commission wants to promote.

The Commission's diversity analysis must change. It can no longer presume that an ownership structure based on separately owned stations in local markets will increase program and viewpoint diversity. Pursing this ownership policy will simply lead to less

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[21]F Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, FCC Office of Plans and Policy, 6 FCC Rcd 3996, 3999 (1991)

[22]*Id.* at 40001.

and less diversity as off-air television stations succumb to the economic pressures of giant multichannel competitors, a result that is contrary to the FCC's intended purpose.

2. Local market combinations enhance diversity and competition

The Commission requested specific evidence regarding the public interest benefits of local market combinations. Because of the duopoly rule, it is impossible to glean specific data from commonly owned local stations. Nonetheless, existing LMAs provide compelling evidence that local market combinations foster diversity and competition. There is ample evidence already in the record that permitting commonly owned stations in local markets will improve service, and therefore diversity in local markets.[23]

Our initial comments documented a 24% cost savings from operating co-located facilities in a single market.[24] By harnessing these efficiencies local stations will be in an economic position to provide more entertainment and news and public affairs programming. No party has challenged these data, which were based on the cost figures from an average mid-sized market station.

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[23]BMC cited to several studies based on 1980s data purporting to demonstrate that deregulation has led to a decrease in news and public affairs programs. See Comments of Black Media Coalition *et al.* The studies have no bearing on the duopoly rule since the rule was in place during the time covered by the study. As documented, *infra*, relaxing the duopoly rule will increase the amount of public interest programming in local markets. Also, the studies cited do not specifically focus on the impact of changes in the ownership rules per se. Rather it focuses on the content based regulations that were changed in the 1980s.

[24]INTV Comments at 30.

Perhaps the best evidence for improved service to the public can be seen in recent LMAs and radio/television combinations.[25] As Malrite explained, the LMA in Cleveland between WOIO and WUAB has helped the stations provide more news to the citizens of that city:

> By entering into an LMA, the two stations (WOIO and WUAB) not only managed to survive but also increased the quantity and quality of their respective local and non-local informational and entertainment programming. WOIO (TV) invested millions of dollars in initiating a new local news service which now employs over 100 news and production people and produces several morning news broadcasts and three major evening newscasts. Both WOIO (TV) and WUAB (TV) now do a better job of programming for the needs and interests of the residents of the Cleveland area and have substantially increased the number of hours of locally-produced programming that each station broadcasts.[26]

In Mansfield, Ohio, the Commission granted a waiver permitting the combination of AM, FM, low power and UHF stations. As a result of the economic advantages associated with joint operation, the UHF station is able to produce five to six hours of new programming each day.[27]

In Naples, Florida, WEVU lacked the financing to operate a viable news department. After entering into an LMA with WBBH-TV, a UHF/NBC affiliate, the total combined news staff increased from 24 to 70 employees. WEVU provides its market with

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[25]Comments of Local Stations Ownership Coalition at 22-33.; Malrite Comments at 38.

[26]Comments of Malrite Communications Corp. at 38.

[27]Comments of Local Station Ownership Coalition at 24.

its earliest (4:00 - 5:00 PM) newscast and plans to provide a 7PM newscast.[28] The beneficial effects of television station LMAs abound. New service has commenced in Louisville, KY; Austin, TX; Battle Creek, MI; Dallas, TX; and Chillocothe, OH, as a direct result of LMAs.[29]

This real world evidence amply demonstrates that public interest programming will increase if stations can combine operations in local markets. Importantly, this actually under estimates the potential for improvements in local market operations. Due to the restrictions placed on LMAs, these stations cannot harness all of the efficiencies that are associated with true common ownership. Common ownership will provide even greater opportunities for the development of new programming, especially news and public affairs programs.

III. Geographic Market: The FCC's Proposed Dual DMA Or Grade A Market Definition Should Be Revised

The *Second Further Notice* proposes to define a local station's geographic market as its Designated Market Area. ALTV supports this tentative conclusion because it best reflects a station's local market. We disagree, however, that the FCC should also look at a station's Grade A contour. As we understand the FCC's proposal, stations located in

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[28]Id. at 31.

[29]*Id.*

different DMAs could not be commonly owned, if there is an overlap of their Grade A signals. The supplemental Grade A test is unnecessary.

First, both the FCC and Congress have recognized that a station's geographic market is best defined in terms of industry standards. Congress expressly recognized this fact in the 1992 Cable Act when it adopted the ADI as a station's local market.[30] This position was also re-confirmed in the 1996 Telecommunications Act which defined a station's local market in terms of its DMA.[31] A similar definition was used to revise the definition of a local station under copyright law.[32] The Commission's own rules , including the national multiple ownership rules, rely on the industry's definition of what constitutes a market. The *Second Further Notice* provides no persuasive evidence why this definition is now inadequate to measure diversity and competition.[33] There is nothing in the record to

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[30]*See* 47 U.S.C. Sec 534 (h)(1)(c).

[31]Pub. L. No. 104-104, 110 Stat 56 (1996)

[32]*See* 17 U.S.C. Sec 111(f)

[33]The FCC's concern about constantly changing DMAs is misplaced. While cable carriage into outlying counties can affect the geographic scope of a particular DMA, DMAs have remained relatively constant over time. For example, the relative size of most local markets, especially in the east, has not changed since the 1960s. Moreover, the FCC has the ability to monitor DMA changes through the must-carry market adjustment process. Overall, DMA changes are not so significant as to create an unstable base on which to administer an FCC rule. The FCC has enforced its national multiple ownership rules for over a decade based on a similar market definitions. Before its repeal, the Prime Time Access Rule was enforced for over two decades based on the ADI (DMA) market definition with little or no administrative problems.

support engrafting an additional "Grade A" test on this universally recognized local market definition.

In this regard, uniform definitions in regulatory policy are important. If the *Second Further Notice* is correct, a station can have a significant impact on diversity and competition outside its DMA. This logic should be applied to all of its rules. Thus, stations should be able to receive must-carry protection on those cable systems outside its DMA but within the Grade A contour. Similarly, these stations should be considered "local" for copyright purposes under the Copyright Act. Also, since the audience reach limits under the national ownership rules are based on the reach of a station in its local market, the audience calculations should be adjusted to include individuals outside the DMA but within the station's grade A. It is simply arbitrary for the FCC to adopt a different market definition for the local ownership rules and not apply this definition across the board. Indeed, the *Second Further Notice* provides no persuasive evidence why a different definition of a station's local market should be employed for the duopoly rule.

Second, while incidental viewing can occur outside a station's local DMA, it is generally not relevant to the FCC's diversity and competition concerns. Nielsen's DMA analysis is based on the predominant viewing patterns. In other words, it is based on what consumers believe to be their own local market and not some arbitrary signal contour. For example, there are overlapping Grade A signals between Baltimore and Washington, DC. Consumers, however, decide for themselves which metropolitan area they belong to. This decision is based on a variety of factors including, housing, work availability, commuting patterns, television program tastes and general lifestyle considerations. Consumers living in Prince Georges County, who work in Washington, do not view themselves as citizens of Baltimore, even though they can receive Baltimore television signals. The same is true for citizens of Baltimore County, Md. Even though they can receive Washington DC stations, they live, work and associate themselves with Baltimore. There are very few residents of the Boston suburbs that perceive themselves as Rhode Islanders simply because they live within the Grade A contour of the Providence stations. The same holds true for those living in the New York suburbs.

These patterns are reflected in the basic economics of television. Programming is purchased for and advertising is directed at consumers living in a local station's DMA. While the signal may reach beyond the DMA, the local market for viewpoint diversity and advertising competition stops at the DMA. While there may be some notable exceptions, reaching an audience outside the DMA, generally provides little or no economic benefit to a local station.

Third, the FCC expresses concern about those who do not subscribe to cable. Because the DMA includes both cable and non-cable households, "reliance on a DMA market definition may conceal the extent to which viewers that rely on free-over-the-air television might be harmed...".[34] This concern is misplaced. The failure to recognize the impact of multi-channel competition in local markets impairs the economic viability of individually owned local television stations. Consumers that do not subscribe to cable will be hurt the most. To the extent there are any economic advantages or efficiencies from owning two stations in separate DMAs but with Grade A overlap, then diversity will be enhanced by permitting these combinations.[35]

Fourth, in what amounts to one of the more amusing arguments, the *Second Further Notice* states a concern about consumers living in the Grade A overlap area. According to the FCC, viewers that previously had access over the airwaves to two separately owned stations now will have fewer separately owned stations available to them.[36] This argument is absurd both in theory and in practice.

Consider two separate DMA markets (A & B) with nine operating stations in each market. Presumably nine over-the-air television stations represents a sufficient amount of

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[34]*Second Further Notice* at 12, para 23.

[35]ALTV finds the FCC's new found concern over diversity and non-cable households interesting. When presented with this argument in the context of the Prime Time Access Rule, the FCC discounted the significance of these homes. In that proceeding it stated: "Thus, the number of viewers who both receive UHF signals and cannot afford cable appears to be relatively low." *Repeal of the Prime Time Access Rule*, 78 RR 2d at 1094. The FCC cannot have it both ways. It cannot discount the importance of consumers relying solely on off-air local television service in one proceeding and then resurrect the concern in another. Sound legal and policy analysis requires consistency.

[36]Second Further Notice at 12 para 24.